Supreme Court, U.S.
FILED
MAR 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1287

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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CLIFTON J. HUMPHRIES,
*Petitioner,*

v.

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; CARGILL, INCORPORATED; and COMMERCIAL UNION INSURANCE COMPANY,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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LAWRENCE P. POSTOL
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Fifth Floor
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 463-2400
*Attorney for Cargill, Incorporated and Commercial Union Insurance Company*

March 7, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTION PRESENTED

Whether the Petitioner's injury occurred upon an area adjoining the navigable waters of the United States, and customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel, as required by 33 U.S.C. § 903(a).

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The Respondents, Cargill, Incorporated, and Commercial Union Insurance Company respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 834 F.2d 372.

## STATEMENT OF THE CASE

Humphries worked for Cargill as a ship foreman at its plant in Chesapeake, Virginia. On December 23, 1974, he sustained injuries in an automobile accident on

Bainbridge Boulevard, approximately 1.5 miles from Cargill. Humphries had driven to a local restaurant to pick up a meal for another foreman, and while checking under the hood of his car, parked in front of the restaurant, was injured when another vehicle struck his car from the rear. Cargill's Chesapeake, Virginia plant occupies a site on the Southern Branch of the Elizabeth River, and includes a pier where ships are loaded with grain. Humphries' accident occurred on Bainbridge Boulevard, in front of a restaurant, between Middle and Hill Streets, about 1.5 miles from Cargill, and several hundreds yards from the river. Bainbridge Boulevard runs north-south, roughly parallel to, and about one-half mile east of, the Southern Branch of the Elizabeth River. Many small businesses are located on both sides of Bainbridge Boulevard, which is intersected by numerous residential streets. Several businesses, some maritime in nature, are situated on the banks of the Elizabeth River. A residential neighborhood lies between the restaurant and the river (App. C-14).

Cargill's workers compensation carrier, Commercial Union, paid Humphries benefits under the Virginia Workers Compensation Act. In April 1984, Humphries filed a claim under the Longshore and Harbor Workers Compensation Act (LHWCA). On January 17, 1986, following a hearing, an administrative law judge of the U.S. Department of Labor issued a decision awarding Humphries compensation under the LHWCA. On December 15, 1986, the Benefits Review Board reversed the ALJ's decision, holding that Humphries' accident did not occur upon a "maritime situs" within the meaning of 33 U.S.C. § 903(a), and that the claim, therefore, did not fall within the coverage of the LHWCA. The U.S. Court of Appeals for the Fourth Circuit, in an opinion issued August 28, 1987, affirmed the BRB, agreeing that the situs requirement of 33 U.S.C. § 903(a) had not been met.

## REASONS WHY THE WRIT SHOULD BE DENIED

### 1. The decision below does not conflict with decisions of this Court.

The Supreme Court has recognized that Congress, in the 1972 amendments to the LHWCA, established a two-part test for coverage under the Act:

> Having established that respondents . . . satisfied the "status" test for coverage under the Act, we consider now whether their injuries occurred on a covered "situs" . . . .

*Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 279 (1977).

The *Caputo* decision dealt primarily with status, and only briefly with situs. The Court held that the pier on which respondent Blundo was injured while checking cargo being removed from a container, was a covered situs (the situs requirement having been conceded as to respondent Caputo):

> Accordingly, we conclude that when Congress sought to expand the situs to avoid anomalies inherent in a system that drew lines at the water's edge, it intended to include an area such as the one at issue here.

*Id.* at 281.

More recently, again in a decision turning upon the "status" issue, this Court has reaffirmed the requirement of a two-part test for coverage under the LHWCA. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985). In a five-four decision, the Court reversed the Court of Appeals for the Fifth Circuit, holding that a welder on a fixed offshore oil-drilling platform was not engaged in "maritime employment" within the meaning of 33 U.S.C. § 902(3). Writing for the majority, Justice White observed:

> Respondents, and the dissenters, object that denying coverage to someone in Gray's position will result in exactly the sort of inconsistent, checkered coverage that Congress sought to eliminate in 1972. In the words of the court below, it creates a "curious hole" in coverage, 703 F.2d at 178, because Gray would have been covered had he been injured on navigable waters or on the outer shelf.
>
> We do not find the argument compelling . . . *there will always be a boundary to coverage, and there will always be people who cross it during their employment.*
>
> * * * *
>
> As we have said before in this area, if Congress' coverage decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them.

*Id.* at 426-427 (emphasis added).

The Petitioner has failed to explain how the Court of Appeals decision conflicts with the decisions of this Court. The Supreme Court, *Caputo*, and *Herb's Welding*, *supra*, has held that the status and situs test must both be satisfied, to establish coverage under the LHWCA. In *Caputo*, the Court specifically found that a pier, used for loading and unloading containers, was a covered situs, because it was a part of a terminal adjoining navigable waters. The Fourth Circuit held that Humphries was not injured on a covered situs, because a restaurant on a public highway, located approximately one and one-half miles from Cargill, did not constitute an "adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel," within the meaning of 33 U.S.C. § 903(a). Clearly, the Court of Appeals has not decided this issue in conflict with the decisions of this Court.

**2. There is no conflict among the circuit courts, such as to require the Supreme Court's intervention.**

Several circuit courts have addressed the situs coverage issue, since the enactment of the 1972 amendments to the LHWCA. The First Circuit has held that an employee injured while stripping a container on a pier approximately 700 feet to 800 feet across the water from the pier at which the container had been unloaded, satisfied the situs requirement. *Stockman v. John T. Clarke & Son of Boston, Inc.*, 539 F.2d 264 (1st Cir. 1976). The court was not called upon to define or delineate the boundaries of an "other adjoining area" within the meaning of Section 3(a), but based its decision upon a determination that the employee was injured at a terminal customarily used in loading and unloading vessels, observing, "we are not faced with the stripping of a container at an inland freight depot having only some incidental connection with navigable waters." *Id.* at 272.

Citing *Caputo, supra*, the Fourth Circuit has ruled that a claimant under the LHWCA must satisfy both the situs and status requirements. *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 169 (4th Cir. 1978). The court found that a submarine shop and a foundry were "integral parts of the shipyard even though they are located 1,200 feet and 3,000 feet respectively from the water's edge,"[2] reasoning that these facilities were located in an area adjoining navigable waters and customarily used in repairing and building vessels. *Id.* In the decision below, the court did not attempt to formulate a comprehensive situs test, instead basing its conclusion primarily upon the fact that the location of the restaurant at which Humphries was injured appeared largely "fortuitous" and was not an "integral part" of Cargill's terminal. 834 F.2d at 375.

The Fifth and Ninth Circuits have developed more detailed analyses to determine whether a location is an

"other adjoining area" within the meaning of the situs statute. Both courts emphasize an area's functional relationship to maritime activity. The Fifth Circuit has held that neither fences and similar boundaries, nor the presence of non-maritime buildings between the point of injury and the water, are conclusive, but that the use to which the site is put is the chief factor:

> The answer to the question of where the boundaries are to an "area" is found right in the statute. *The perimeter of an area is defined by function.* The "area" must be one "customarily used by an employer in loading, unloading, repairing, or building a vessel." The statute does not require that the area's exclusive use be for maritime purposes so long as it is customarily used for significant maritime activity.

*Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 515 (5th Cir. 1980) (emphasis added).

The Ninth Circuit, like the other courts which have addressed the situs issue, has not attempted to devise a conclusive test. Rather, the court reasoned that "the phrase 'adjoining area' should be read to describe a *functional relationship* that does not in all cases depend upon physical contiguity," and identified four factors helpful in determining whether a site is an "adjoining area":

> The particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

*Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 141 (9th Cir. 1978) (emphasis added).

In *Winchester* and *Herron*, *supra*, the courts articulated similar guidelines and, applying those tests to sim-

ilar facts, reached identical conclusions (that a gear room, located several hundred yards from the water was a covered situs, because it was situated as close as feasible to the water, and was an integral part of the loading and unloading process).

The Petitioner cites *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1982), as an example of confusion and inconsistency within a circuit. The Petitioner, however, misconstrues the court's holding in *Perkins*. The Employer had not asserted the coverage defense, and the administrative law judge did not address the issue. On appeal, the Benefits Review Board raised the situs issue, holding that it went to the question of subject matter jurisdiction. The Ninth Circuit reversed and remanded, ruling that the Benefits Review Board was without authority to raise the issue *sua sponte*, because situs pertains to coverage, not subject matter jurisdiction. The court held that the employer had waived the right to contest coverage on situs grounds, concluding:

> Given Perkins' undisputed status as a maritime employee *and the closeness of the situs issue (which we need not resolve here)*, the case clearly presented a sufficient nexus with traditional maritime activities to vest the Board with subject matter jurisdiction to address the issues raised by Marine on appeal.

*Id.* at 1102 (emphasis added).

The Third Circuit has sounded the only discordant note among the circuits with respect to the situs issue, holding, in effect, that the situs requirement should be disregarded. *Sea-Land Service, Inc. v. Director, Office of Workers Compensation Programs*, 540 F.2d 629 (3rd Cir. 1976). The court remanded the case because it felt the evidence adduced at the hearing pertained to situs, which the court believed was largely irrelevant:

> As long as the employment nexus (status) with maritime activity is maintained, the federal compensa-

> tion remedy should be available. *Resuscitating the situs requirement in cases satisfying the status test will interfere with Congress' intention to eliminate the phenomenon of shifting coverage.* It is the situs of vessels in maritime commerce, not the situs of their maritime employees at the time of the injury, that in our view Congress referred to by its reference to navigable waters.

*Id.* at 638 (emphasis added).

No other circuit has adopted this approach. The Supreme Court has implicitly rejected this interpretation of the situs/status test:

> The 1972 Amendments thus changed what had been essentially only a "situs" test of eligibility for compensation to one looking to both the "situs" of the injury and the "status" of the injured. We must now determine whether respondents Caputo and Blundo satisfied these requirements.

*Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 264-265 (1977); *see Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985).

**3. It is not the Supreme Court's function to review facts and re-weigh the evidence.**

The situs determination under the LHWCA turns upon a careful weighing of facts, and is not particularly well-suited to the application of formulas and tests. Where the lower court decision turns solely upon an analysis of the particular facts involved, this Court will usually deny certiorari. *U.S. v. Johnston*, 268 U.S. 220, 227 (1925).

Where a court of appeals has reviewed administrative agency findings, the Supreme Court will only rarely intervene, where the substantial evidence standard of review "appears to have been misapprehended or grossly misapplied." *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 310

(1974). The Petitioner argues that the decision below was "based on patent mistakes of fact in evidence" (Petition, p. 33). The Benefits Review Board and the court of appeals have reviewed the administrative law judge's findings of fact. It is not this Court's duty to do so again.

**4. The court below correctly decided the situs issue in this case.**

In affirming the decision of the Benefits Review Board, the Fourth Circuit followed its own precedent, and the guidelines established by the other circuits, expressly rejecting, however, the Third Circuit's approach, expressed in *Sea-Land Service*, *supra*. The court acknowledged that there is no single, comprehensive situs test, and based its decision upon four factors.

While agreeing that an injury need not occur within a specified distance of navigable waters, to satisfy the situs requirement, the court nonetheless found relevant the fact that Humphries' accident happened more than one mile from Cargill's terminal. 834 F.2d 372-373, 375. At the time of his injury, Humphries was not traveling between two portions of Cargill's terminal, and his route did not traverse a continuous or contiguous terminal area. *Id.* at 375. The court concluded that the restaurant to which Humphries had traveled, separated from the river by a residential area, was not an "integral part" of Cargill's terminal, and agreed with the Benefits Review Board, that the location of the restaurant was "fortuitous," not dictated by proximity to the waterfront. *Id.*

The Petitioner's emphasis on the legislative intent underlying the 1972 amendments, is misplaced. As this Court discussed in *Caputo* and *Herb's Welding*, *supra*, Congress, in expanding the geographic reach of the LHWCA, was responding to a changed maritime environment, in which containerization and other developments

had moved inland many of the traditional stevedoring functions which had formerly been conducted at the water's edge. Unlike *Winchester* and *Herron*, *supra* (both cases holding that a gear room located outside the terminal gates, was nonetheless a covered situs), this case does not raise questions emanating from changes in marine technology or the landward expansion of traditional maritime facilities.

Humphries was injured on a public highway in front of a restaurant, between one and one and one-half miles from Cargill's terminal. Had the restaurant been located even farther away from the river and the Cargill terminal, one would assume the Petitioner would still argue that Humphries "carried situs" wherever he went, as long as he was engaged in his employer's business. As the court below concluded, "were we to read the situs requirement so broadly as to embrace this claim, however, we would come perilously close to eliminating it entirely." 834 F.2d at 375.

The only way to elminate uncertainty and "walking in and out of coverage," would be to discard the situs requirement itself. No single test will guarantee uniformity of results, an end which can not be achieved unless the statute itself is changed. That is the province of Congress, not the courts.

## CONCLUSION

The Court of Appeals' decision neither conflicts with Supreme Court precedent, nor with the decisions from the other circuits, with the exception of the Third Circuit, whose decision in *Sea-Land Service, Inc. v. Director, OWCP*, *supra*, has been discredited by this Court. The situs determination turns almost entirely upon an analysis of the particular facts of the case, which have been reviewed by the Benefits Review Board and the court of

appeals. A further review of the facts is neither necessary nor appropriate. The petition should be denied.

Respectfully submitted,

LAWRENCE P. POSTOL
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Fifth Floor
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 463-2400
*Attorney for Cargill, Incorporated and Commercial Union Insurance Company*

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